STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Kirsten Frank Kelly, P.J., and Joel P. Hoekstra and William C. Whitbeck, JJ.

PEOPLE OF THE STATE OF MICHIGAN Plaintiff-Appellee, v. DENNIS LEE TOMASIK, Defendant-Appellant.	Supreme Court Case No. 149372 Court of Appeals Case No. 279161 Kent Circuit Case No. 06-3485-FC

BRIEF OF THE PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN AS *AMICUS CURIAE* IN SUPPORT OF THE PEOPLE OF THE STATE OF MICHIGAN

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SUMMARY OF ARGUMENT

Pursuant to the Order granting Defendant's Application for Leave to Appeal, this Honorable Court has graciously invited the Prosecuting Attorneys Association of Michigan (the "PAAM") to file the instant Brief as Amicus Curiae in support of the People of the State of Michigan. Stated broadly, the PAAM fully supports the People's arguments as stated in Appellee's Brief on Appeal, and the instant Brief will not redundantly restate those arguments herein. Instead, the PAAM writes separately to specifically address the admissibility of expert testimony regarding Child Sexual Abuse Accommodation Syndrome ("CSAAS") under the Michigan Rules of Evidence, and in light of this Court's holdings and analysis in *People v Kowalski*, 492 Mich 106; 821 NW2d 14 (2012).

This Court has long held that a qualified expert is permitted to testify during the prosecution's case-in-chief regarding the typical and relevant symptoms of child sexual abuse to explain a victim's specific behavior. Allowing such testimony on CSAAS ensures that jurors will not incorrectly construe a child victim's behavior to be inconsistent with that of a genuine victim of abuse. In addition, where a defendant attacks a child's credibility or questions the child's post-incident behavior, this Court has determined that the prosecution may also call a CSAAS expert to testify that the victim's behavior was consistent with other children who were sexually abused.

In this case, given the well-established law permitting CSAAS expert testimony in criminal trials, it is evident that the trial court properly allowed

the People's expert to testify regarding CSAAS at trial, although the expert was not permitted to testify that the child was actually a victim of sexual abuse. To the extent that the testimony was limited to explaining the typical and relevant symptoms of child sexual abuse and that the victim's behavior was consistent with other children who were sexually abused, the trial court did not err in permitting the CSAAS expert to testify at trial. Accordingly, this Court should **AFFIRM** that decision and uphold the admissibility of appropriate expert testimony on CSAAS in criminal child sexual abuse cases.

STATEMENT OF QUESTION PRESENTED

DID THE TRIAL COURT ERR BY PERMITTING THE PEOPLE'S EXPERT TO TESTIFY ABOUT CHILD SEXUAL ABUSE ACCOMMODATION SYNDROME?

Defendant's Answer: "Yes"

People's Answer: "No"

Trial Court's Answer: "No"

Court of Appeals' Answer: "No"

Amicus Curiae's Answer: "No"

STATEMENT OF FACTS

The PAAM accepts and adopts the facts as stated in Appellee's Brief on Appeal as complete and accurate to allow this Court to render its decision in this case.

ARGUMENT

THE TRIAL COURT DID NOT ERR BY ALLOWING THE PROSECUTION TO CALL AN EXPERT ON CHILD SEXUAL ABUSE ACCOMODATION SYNDROME IN ITS CASE-IN-CHIEF AT TRIAL.

STANDARD OF REVIEW

Typically, this Court reviews a circuit court's decision to admit or exclude expert testimony at trial for an abuse of discretion. *People v Kowalski*, 492 Mich 106, 119; 821 NW2d 14 (2012). An abuse of discretion occurs when the trial court selects an outcome that falls outside the range of principled outcomes. *Id.* However, Defendant did not object to the expert testimony at trial, so this Court's review is for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Thus, Defendant must establish that an error occurred, that the error was plain, and that the plain error affected substantial rights. *Id.* And error affects a defendant's substantial rights when it affects the outcome of the lower court proceedings. *Id.*

ARGUMENT

When dealing with expert testimony, the trial court acts as a gatekeeper to make sure that the evidence is relevant and reliable. *Id.* (citing to *Daubert v Merrell Dow Pharmaceuticals Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993)). This function is not limited to scientific testimony alone, but also to any expert testimony that is based on technical or specialized knowledge. See *Kumho Tire Co Ltd v Carmichael*, 526 US 137; 119 S Ct 1167; 143 L Ed 2d 238

(1999). Under current Michigan law, such expert testimony is admissible as long as it is relevant and properly vetted pursuant to Michigan Rules of Evidence. See *Kowalski*, 492 Mich at 119; MRE 702.

Pursuant to the Rules of Evidence, MRE 702 establishes the prerequisites for the admission of expert witness testimony:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

See *id.*; MRE 702. The purpose of the rule is to assist the jury in understanding testimony or physical evidence that may be presented that is outside the common knowledge or understanding of the layperson. See *id.* at 120-121. Before testifying, the court must be satisfied that the expert witness has the appropriate knowledge, skill, experience, training, or education. MRE 702. The trial court must be certain that the underlying data as well as the methods the expert relied upon to form his conclusions are reliable. See *Gilbert v Daimler Chrysler Corp*, 470 Mich 749; 685 NW2d 391 (2004).

This Court's decision in *Kowalski* allows for expert testimony regarding CSAAS. In *Kowalski*, this Court held that an expert could testify to a person's behavior that would be contrary to what a lay person would expect. *Kowalski*, 492 Mich at 129. However, in that case, the Court upheld the trial court's

decision to exclude the testimony because it did not satisfy all of the requirements of MRE 702. *Id.*

Testimony regarding CSAAS is admissible to identify certain coping behavior as that associated with CSAAS not whether a child has actually been abused. See *People v Peterson*, 450 Mich 349; 537 NW2d 857 (1995). "Child abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim. A child's feelings of vulnerability and guilt and his or her unwillingness to come forward are particularly acute when the abuser is a parent." *Pennsylvania v Ritchie*, 480 US 39, 60; 107 S Ct 989; 94 L Ed 2d 40 (1987). In child sexual abuse cases, the child victim is likely victimized by a member of the child's household, or at least by somebody the child knows. Lyon & Dente, *Criminal Law: Child Witnesses and the Confrontation Clause*, 102 J Crim L & Criminology 1181, 1203 (2012). Child sexual abuse by a person familiar to the child is as much a psychological assault as it is a physical assault and certain behaviors require expert testimony to address why a child may be acting a certain way. See *United States v Renville*, 779 F2d 430, 437 (CA 8, 1985). Moreover, children are conditioned from an early age to listen to an adult and to follow the adult's directions. *Criminal Law: Child Witnesses*, 102 J Crim L at 1207. Because a layperson may categorize certain behavior as inconsistent or contradictory with that of a victim of sexual abuse, the testimony is relevant and necessary to allow the jury to make an informed decision, and CSAAS seeks to address why

a child may be behaving in a certain way that is contrary to that which a person may expect.

Dr. Roland Summit first discussed CSAAS in 1983. Summit, *The Child Sexual Abuse Accommodation Syndrome*, 7 Child Abuse & Neglect 177 (1983). He based his findings on years of clinical observations and noted patterns emerging in treating child victims of sexual abuse. Summit, *Abuse of the Child Sexual Abuse Accommodation Syndrome*, 1 J of Child Sexual Abuse 153, 155 (1992). He combined his findings with consults from a dozen other specialists in the field to support the theory. *Id.* CSAAS acknowledges that, while there will be variations, and while not all cases will follow the framework laid out in the Article, it is still necessary to understand CSAAS and the potential behavioral consequences that a child victim may have to endure, such as self-blame, self-hate, alienation, and re-victimization. *The Child Sexual Abuse Accommodation Syndrome*, 7 Child Abuse & Neglect at 177, 180. CSAAS and the behavioral patterns within it are present in every known form of child sexual victimization. *Abuse*, 1 J of Child Sexual Abuse at 156.

In 1992, Dr. Summit clarified his position because of rampant misinterpretation and misunderstanding of his findings as published in the Article from 1983. *Id.* Most of the misunderstanding was a result of the word "syndrome," and Dr. Summit stated that, had he "known the legal consequences of the word at the time, [he] might have better chosen a name like 'Child Sexual Abuse Accommodation *Pattern*' to avoid any pathological or diagnostic implications." *Id.* at 157. In short, Dr. Summit acknowledged that

CSAAS cannot be used to diagnose child sexual abuse, and is only offered to explain behavior patterns and how a child will cope with the abuse. *Id.* This Court has even stated that it would be inappropriate to use the term "syndrome" except when discussing specific behavior. *Peterson*, 450 Mich at 362-363 (citation omitted).

Applying these principles to the investigation and prosecution of child sexual assaults, the most common behaviors that seem to run contrary to a lay person's general expectations are: (1) the victim's behavior during the assault, i.e. not calling for help and not resisting; (2) the victim's behavior immediately after the assault i.e. not reporting immediately; (3) the victim's behavior during subsequent assaults, i.e. accommodating the abuser, using the abuser for personal gains, or acquiescing to the abuse; and (4) the victim recanting after disclosure. *The Child Sexual Abuse Accommodation Syndrome*, 7 Child Abuse & Neglect at 182-185.

Where a child sexual assault victim's behavior is contrary to what one would anticipate, CSAAS testimony must be admitted to explain that victim's behavior, but not to opine on whether the victim was actually abused. In fact, such testimony identifying and explaining a child's behavior is not unique to child sexual abuse cases. See *People v Christel*, 449 Mich 578; 537 NW2d 194 (1995). In *Christel*, this Court stated that, when offered properly, testimony regarding delayed disclosure, recanting allegations, and remaining in an abusive domestic environment or relationship, is both relevant and non-prejudicial as long as the expert does not opine on whether the victim was

actually abused or that the defendant perpetrated that abuse. *Id.* at 579. And while *Christel* focused on adults in abusive domestic relationships, children are much more susceptible to mental and emotional trauma suffered at the hands of a trusted adult.

Our United States Supreme Court has detailed the susceptibility of children when evaluating the interrogation of child suspects:

> We have observed that children generally are less mature and responsible than adults, that they often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them, that they are more vulnerable or susceptible to . . . outside pressures than adults, and so on.

JDB v North Carolina, ___ US ___; 131 S Ct 2394, 2403; 180 L Ed 2d 310 (2011) (internal citations and quotations omitted). The analysis and proposition in *JDB* stands in this case as well—a child lacks the judgment and perspective of an adult. See *id.* In cases where the child continues to be victimized, testimony as to why the child behaves in a certain manner is both relevant and reliable when that testimony is sought to identify the behavior.

When a child does come forward to report abuse, it is most likely because that child wants the abuse to stop, not that the child seeks prosecution. See *Ohio v Clark*, ___ US ___; 135 S Ct 2173; 192 L Ed 2d 306 (2015). In fact, most likely, the child victim does not want the perpetrator harmed, especially where the child has some affinity for the abuser. See *Kennedy v Louisiana*, 554 US 407; 128 S Ct 2641; 171 L Ed 2d 525 (2008). Because a child does not likely understand the legal process and the

consequences of such disclosure, that child may become uncomfortable or unwilling to participate when faced with the reality of punishment for a familiar perpetrator. In such a case, the child's behavior is contrary to what a lay person might expect, and CSAAS testimony is necessary and admissible to explain the child's behavior.

This Court has stated that "expert testimony concerning syndrome evidence is sometimes necessary to explain behavioral signs that may confuse a jury so that it believes that the victim's behavior is inconsistent with that of an ordinary victim of child sexual abuse." *Peterson*, 450 Mich at 362. In making that statement, the Court identified a list of behavioral signs outlined by the American Medical Association that included, in relevant part, sexual promiscuity and play, subtle disclosures, and a positive relationship with the abuser. *Id.* at 363 n 7. These signs play into the larger framework of CSAAS, as some of them lead to contrary reactions to sexual abuse.

Child sexual abuse typically begins with stages commonly referred to as "grooming." The Court of Appeals acknowledged the existence of such a pattern when it allowed testimony about how a perpetrator would "desensitize" a victim over time. See *People v Ackerman*, 257 Mich App 434, 433; 669 NW2d 818 (2003). Such a position, by its very nature, implies a scenario where the disclosure will be delayed. Grooming and CSAAS have a causal relationship in that grooming identifies the behavior from the abuser, and CSAAS identifies the child's response the abuse. Grooming occurs over time and represents a pattern where the perpetrator identifies the target, and then gains trust and

access. *Criminal Law: Child Witnesses*, 102 J Crim L at 1205. Throughout this grooming process, the perpetrator builds a relationship with the child victim that allows their abuse to intensify over time, all while desensitizing the child victim. And from the outside looking in, the child victims are seemingly allowing themselves to be continuously victimized, they blame themselves for the abuse, and they may even begin to exploit the abuser or seek out the abuse. *The Child Sexual Abuse Accommodation Syndrome*, 7 Child Abuse & Neglect at 177. But CSAAS explains that behavior and tells us why a child victim allowed the abuse to continue.

To a layperson, a victim would not want to be victimized, so CSAAS presents a response to typical defense arguments that a "real" victim would resist and immediately report the abuse, or that a parent or guardian would know that the child had been sexually assaulted. *Id.* at 156-157. Yet prosecutors seek to use CSAAS to explain this contradiction in the manner permitted by this Court and outlined by the criminal jury instructions. See CJI2d 20.29. The jury instruction clearly establishes that CSAAS expert testimony is not permitted to establish that the crime was committed or that the child victim is telling the truth. See *id.* Rather, it is allowed only to assist the jury in deciding whether the child victim's actions and words were consistent with that of a child who was sexually abused. *Id.*

Justice Cavanagh's dissent in *Peterson* illustrates the issue presented for CSAAS perfectly. *Peterson*, 450 Mich at 381 (CAVANAUGH, J., dissenting). There, he states that behavioral testimony is "too varied and unreliable" to

detect sexual abuse, that the behavior could be from non-sexual abuse to the child, and that CSAAS cannot be a diagnostic tool. *Id.* at 384. He further opines that, in order for such testimony to be admitted, it must be "*exclusively* associated with sexual abuse" as a "reliable and standardized . . . detector." *Id.* at 382-383 (emphasis in original).

The problem with that dissent is that Justice Cavanagh sought to use CSAAS as a detector or diagnostic tool, while wanting to highlight behavior exclusive to child sexual abuse. But child sexual abuse *is* child abuse. Just because the law identifies the terms differently does not mean that one behavior can never be associated with the other. Moreover, few, if any, symptoms within any medical discipline are related to a single diagnoses. For example, nausea could be from a panic attack, anxiety disorder, stomach flu, food poisoning, cancer, or even pregnancy. Such variations are acceptable and subject to cross examination by a defense attorney. Just because the behavior could be a signal of child sexual abuse does not mean that it *is* from child sexual abuse, and it is not the Court's job to make that determination. Instead, the jury gets to make that call. Nevertheless, CSAAS was never intended to be a diagnostic tool or to detect sexual abuse, and admitting such testimony would be improper. In short, CSAAS has been criticized for falling short on its ability to do something that it was never intended to do. *Criminal Law: Child Witnesses*, 102 J Crim L at 1202 n 130.

There is also scientific support for the coping behaviors associated with CSAAS. In 2002, Thomas D. Lyon compiled data from numerous studies

dealing with children between ages five and 11 and their ability to keep a secret. Lyon, *Scientific Support for Expert Testimony on Child Sexual Abuse Accommodation*, in 107 Critical Issues in Child Sexual Abuse (2002). In a controlled environment, the children were asked to keep a secret regarding ink stained gloves, a broken glass, a book thief, and a broken doll. *Id.* When the perpetrator was the child's parent, only one out of the 49 children disclosed that their mother broke the doll, and some of the interviews even contained leading questions after the child refused to disclose. *Id.* And when the perpetrator was a stranger, less than 50% of the children disclosed, and even when asked directly about the event, more than 1/3 of the children still did not tell. *Id.* at 122. This study clearly demonstrates that a child will comply and keep a secret if asked, and even more compelling is the fact that, when the perpetrator is a parent, the disclosures are simply non-existent.

Parents routinely tell their children do to what is right, but when that parent is the abuser, the parent coerces the child to keep the secret "for the sake of the family," when in reality, it is for the parent's sake. Such a scenario plays out where the abuser is the child's father and he tells the child victim that, if the child does what the mother says, he will go to prison and the family will be ruined. In that scenario, the child victim suffers additional turmoil, fear, and confusion, and that fear and confusion can make a recanting or minimizing child victim appear to be untruthful. Thus, testimony to describe the contradictory behavior is relevant and necessary to explain why a child would not disclose abuse, especially when the abuser is the child's trusted

confidant. Without it, the child will appear to be lying and called as much by competent defense attorney who needs no expert testimony to offer such a conclusion.

Without proper CSAAS testimony, the true reasons behind a victim's delayed or incomplete disclosure, continued abuse, and recantation after disclosure will not be introduced to allow the jury to make a rational decision. Once again, most laypersons have a general expectation that a victim would resist, scream, or get away from the abuser, and if unable, would immediately tell another person. *The Child Sexual Abuse Accommodation Syndrome*, 7 Child Abuse & Neglect at 182. But the idea that a child would scream or immediately seek help assumes that the child would first recognize that what was happening was wrong. Goodman-Brown, *et al*, *Why Children Tell: A Model of Children's Disclosure of Sexual Abuse*, 27 Child Abuse & Neglect 525, 526 (2003). Additionally, some victims blame themselves or believe that they have granted permission to the abuser, and as a result, may take longer to disclose that abuse. *Id.* at 528; *Criminal Law: Child Witnesses*, 102 J Crim L at 1208. Finally, in intra-familial cases, the delayed disclosure may be incomplete, or the victim may recant due to the fear of potentially negative consequences for that child victim, the abuser, or other family and friends. *Id.* at 537. As described by Dr. Summit in his clarification of CSAAS, "Silence is intrinsic to the victimization process." *Abuse*, 1 J of Child Sexual Abuse at 159.

Without the benefit of expert testimony, a child who returns to the abuser, does not immediately disclose the abuse, or recants the initial

disclosure is substantially at risk for being viewed by the lay jury as an incredible witness. But the nature of the relationship between the child victim and the abuser *must* be considered when evaluating the child's behavior. Throughout the "groomed" relationship and multiple abusive encounters, a child of sexual abuse often begins to believe that he or she "has provoked the painful encounters," or has somehow given the abuser permission to continue the abuse. *The CSAAS*, 7 Child Abuse & Neglect at 184; *Criminal Law: Child Witnesses*, 102 J Crim L at 1208. Combining those thoughts with the abusers' subtle threats that no one will believe the child victim and that disclosure would destroy the family, a child victim of sexual abuse is uniquely trapped.

Even when a child victim does ultimately disclose sexual abuse, the layperson's typical response is disbelief. *Id.* at 185. And in many cases where a child victim has disclosed and is believed, there is always the possibility that the victim will recant that disclosure. *Id.* at 188. When that occurs, adversaries of CSAAS testimony routinely claim that the recantation means that the abuse never really happened. But that is not the only explanation—it is, however, the only explanation that does not require expert testimony.

Furthermore, a person suffering from Post-Traumatic Stress Disorder ("PTSD") is known to recant certain traumatic events, and children who are physically and sexually abused nearly always develop some form PTSD. Koverola, *Post-Traumatic Stress Disorder in Sexually Abused Children: Implications for Legal Proceedings*, 2 J of Child Sexual Abuse 119, 123 (1993). The severity and frequency of the abuse are the best predictors of whether the

victim will experience symptoms of PTSD. *Id.* As such, because of the abuse and subsequent PTSD, a child victim may likely recant a prior disclosure because of pressure to save the family from falling apart or from financial ruin. *Id.* at 125. Moreover, the:

> repeated court room interrogations of a child experiencing PTSD could actually intensify the child's capacity to avoid the memory. One would predict that in these situations children suffering from PTSD would have a high likelihood of retracting their disclosure, or at least of minimizing the details.

Id. As recanting is a potential part of CSAAS and indicative of PTSD, expert testimony is required to explain the potential inconsistency in the child's behavior. It is imperative to note that the argument is not, and can never be, that, because the child victim recanted, the allegation must be true. Rather, the argument is, and will remain, that child victims who recant may be doing so out of fear of potential negative repercussions for themselves, their abuser, or their family, and that they may be recanting out of a sense of responsibility to save the family or as a result of PTSD.

CSAAS testimony, when properly admitted, is undoubtedly reliable, and that reliability is what sets the testimony apart from the expert testimony offered in *Kowalski*. Child victims do not immediately disclose abuse and recant those disclosures for a variety of reasons, and those reasons are based upon reliable data and observations that have been documented and detailed in numerous publications, studies, and reports. In *Kowalski*, this Court agreed that expert testimony is admissible when it is based upon a reliable

foundation and research. But in that case, the expert began his analysis with a false premise, relied upon untestable conclusions, and based his findings on unreliable sources. *Kowalski* at 113, 132-134.

Contrary to *Kowalski*, expert testimony on CSAAS is based upon reliable data, including numerous studies, research, and reports, and it does not seek conclusions to categorize child sexual abuse victims. Moreover, proper CSAAS testimony acknowledges that variations will occur and that the expert testimony should not be regarded as a conclusion-based checklist that establishes abuse. And there is no dispute that CSAAS testimony cannot be quantified to scientific certainty, but there is also no question that MRE 702 does not require such quantification for the testimony to be admissible. Instead, the rule requires only that the testimony be based on reliable data. The mere fact that a jury may reach the conclusion that a child was abused because that child's behaviors were consistent with the CSAAS testimony does not render that testimony to be inadmissible. As long as the CSAAS expert does not testify to that opinion or conclusion, the testimony is, and has been, admissible at trial. *Kowalski* at 129-130 n 56.

It is true that a layperson may very well have knowledge that an alleged victim of sexual abuse often delays disclosing that sexual abuse, would not resist such abuse, may return to the abuser, or may recant a truthful disclosure. And while expert testimony might not be necessary to simply inform the jury of these behaviors, it is certainly necessary to inform the jury that such behavior is not inconsistent with that of a genuine victim of sexual

abuse. Although the expert cannot testify that the specific child victim was abused or that the defendant abused the child, the expert can surely testify that the child's behavior is consistent with that of a child of sexual abuse. Without the benefit of an expert's testimony regarding CSAAS, a lay jury will not be given the benefit of understanding how a child's behavior, attitude, and personality coincides with that of an abused child. And because the jury is the sole judge of whether a child was the victim of sexual abuse at the hands of a defendant, it must be provided with expert testimony on CSAAS to understand how a child victim may behave.

RELIEF REQUESTED

In the case at bar, Defendant attacked both the victim's credibility, and his post-incident behavior. In light of that attack, the admission of Thomas Cottrell's expert testimony regarding CSAAS was not plainly erroneous. For these reasons, and for those set forth in the Appellee's Brief on Appeal, the PAAM supports the People of the State of Michigan, and respectfully urges this Honorable Court to **AFFIRM** the decision of the Court of Appeals and the trial court.

Respectfully Submitted,

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